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ENGINEERING & CONSTRUCTION DIRECTIVE

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Chief Engineer

Proprietary Products in Construction Contracts

This directive provides guidance and establishes procedures for the most common situations involving the specification of proprietary products in construction contracts. It applies to Department of Transportation (Department) contracts and those administered by municipalities with Department-administered funds, except State Local Bridge Program and Local Transportation Capital Improvement Program (LOTICIP) funds. This directive is effective immediately and supersedes the June 8, 2011 memorandum with a “Proprietary Products in Construction Contracts” subject line.

GENERAL

Publicly funded procurements should generally be made through free and open competition. However, innovations in the marketplace sometimes create situations where a needed or beneficial product is only available from a very limited number of sources or single source. To attain the benefits these unique products provide, while maintaining a generally competitive procurement environment, a certain amount of flexibility is permitted.

Technical specifications can be prepared using several different approaches. No single approach is best for all circumstances; the specific conditions and requirements determine which approach is most appropriate for a particular item, material or process specification. The types of specifications addressed in this directive are described below and listed in their general order of preference:

1. **Nonproprietary** specifications identify end-results without reference to any brand name or patented product. Nonproprietary specifications are free of unnecessary requirements that might restrict competition. Specifications developed by standards organization (e.g., ASTM International) are generally nonproprietary but may be considered proprietary if only one source can meet the specification requirements.
2. **Brand-name “or approved equal” product** specifications identify one or more acceptable brand-name alternative items and include the “or approved equal” provision. The purpose and critical characteristics of the item are also specified. An approved equal is a product not listed in the specification that the contractor may propose for use and, if it meets the critical characteristics, the contracting agency (Department or municipality) may approve for use.

3. **Brand-name product** specifications identify one or more acceptable brand-name alternative items without the “or approved equal” provision.

Although listed in general order of preference, under certain circumstances each of these approaches is most appropriate.

IDENTIFYING PROPRIETARY DESIGNATION

When a brand name is used in a specification, it may be classified as proprietary and require approval. A definitive determination is based on funding source(s) as described below.

No FHWA Funding

These are contracts for which the Federal Highway Administration (FHWA) provides no funding. Contracts with funding from the Federal Transit Administration (FTA), Federal Aviation Administration (FAA) are included in this group, provided there are no FHWA funds. This category also includes contracts funded by State-only sources, except those funded only by the State Local Bridge Program or LOTCIP.

For contracts in this category, a proprietary specification is one that:

- Identifies one name brand only (i.e., a single manufacturer) and does not include the “or approved equal” provision, or
- Does not include a brand name but is so specific and restrictive that it may be obtained from only one source.

FHWA Funding

These are contracts funded wholly or partially by the FHWA. For contracts in this category, a proprietary specification is one that:

- Identifies one name brand only (i.e., a single manufacturer), regardless of inclusion of “or approved equal” provision, or
- Identifies two name brands and does not include the “or approved equal” provision, or
- Does not include a brand name but is so specific and restrictive that it may be obtained from only one source.

JUSTIFICATION

The following conditions may justify approval of a proprietary specification:

1. **Proprietary product is essential for synchronization.** Synchronization can refer to functional (i.e., technological compatibility), aesthetic (i.e., visual appearance matches existing features) or operational (i.e., interchangeable with the maintenance inventory) factors. Traffic signal system replacement and expansion components are a common example of equipment requiring functional and operational synchronization. For this condition, the contracting agency must certify that the proprietary product is the only known device compatible with an existing system.

2. **No equally suitable alternative is available.** An example of a product that may be uniquely suitable is a roadside safety hardware component meeting crashworthiness requirements and suitability for particular site condition and constraints. For this situation, the contracting agency must certify there is no known equally suitable alternative. In searching for possible suitable alternatives, seek assistance from the Research Liaison Committee Chair (currently Leo Fontaine).
3. **Item is new or innovative experimental feature.** When a new, potentially beneficial product enters the market, it may be desirable to evaluate the item in an operational (i.e., “real world”) environment even though other acceptable product(s) may be available. For this condition, an approved product evaluation work plan is needed. The time required for its development should be factored into the project development schedule.

There may be rare cases when a proprietary procurement is justified for reasons other than one of the three stated above. A possible example: several equally suitable alternatives are available but a single proprietary product is specified because it’s produced by a non-profit institution that trains the disabled. [This example is hypothetical and may or may not be approved.] Approval requests for situations other than the three noted above are rare and may require a Public Interest Finding. Situations not covered by this directive will be handled on a case-by-case basis, in consultation with the appropriate funding agency (e.g., FAA, FHWA, FTA).

Approvals may be project-specific or programmatic. Programmatic approvals cover specific product(s) when certain conditions (identified in the documentation) are satisfied. Programmatic approvals have a finite and defined duration, generally one to four years. Programmatic approvals can be extended beyond the original expiration date by a documented reassessment and approval.

APPROVALS

As previously stated, this directive addresses approvals supported by either a Certification or work plan. This section identifies the documentation and process for securing approval. The Engineering Administrator approves all proprietary product designations addressed by this directive.

Certifications

Two of the conditions described in the previous (Justification) section require a Certification. The Certification is a statement by the appropriate contracting agency official attesting that the proprietary product is essential for synchronization with existing facilities; or that no equally suitable alternative exists. The form/text of the Certification varies by funding source as indicated below.

No FHWA Funding

"I (name of certifying official), (position title), of the (Name of contracting agency), do hereby certify that this patented or proprietary item is essential for synchronization with existing highway facilities,

or

"I (name of certifying official), (position title), of the (Name of contracting agency), do hereby certify that no equally suitable alternative exists for this patented or proprietary item.

FHWA Funding

"I (name of certifying official), (position title), of the (Name of contracting agency), do hereby certify that in accordance with the requirements of 23 CFR 635.411(a)(2), that this patented or proprietary item is essential for synchronization with existing highway facilities,

or

"I (name of certifying official), (position title), of the (Name of contracting agency), do hereby certify that in accordance with the requirements of 23 CFR 635.411(a)(2), that no equally suitable alternative exists for this patented or proprietary item.

Certifications for Department-administered contracts (i.e., advertised and awarded by the Department) are signed by the Engineering division chief or a principal engineer with expertise in the technical discipline. For contracts administered by a local public agency (i.e., municipality), the Certification is signed by an official from the local contracting agency.

Work Plans

When the proprietary product procurement is being procured so that it can be evaluated, an experimental work plan is needed. Considerable time is needed for the contracting agency to develop and secure approval of the work plan. This time should be included in the pre-Final Design Plan schedule.

Approval documentation consists of:

- Memorandum, signed by the lead division chief, recommending and requesting approval, with the following information included or attached:
 - Project identification or period of applicability (for programmatic),
 - Proprietary product name (i.e., make and/or model),
 - Justification for approval,
 - Associated contract (pay) item(s) and description,
 - A description of how the proprietary product requirement will benefit the public,
 - The estimated costs of the product and incremental cost, compared to a non-proprietary product,
 - Specifications and other pertinent product information,
 - For programmatic approvals, identify the conditions of applicability,
 - When associated with a Certification, identify the unique needs that other products do not satisfy and products that were reviewed and considered inadequate,
 - Documentation of coordination with the Research Liaison Committee Chair when approval is requested based on a “No Equally Suitable Alternative” Certification.
- Certification (signed by appropriate official, as previously described) or approved work plan, as an attachment.
- Line(s) for digital signature/approval.

The lead division should assemble the documentation package as a single, portable document format (pdf) file and upload it to the “Programmatic Approvals” or “Project Specific Approvals” ProjectWise folder within “4.00 – Engineering Libraries\Proprietary Product Approvals.” Send the Engineering Administrator an email, with a descriptive subject line, requesting approval and include a hyperlink to the ProjectWise file. Following review, the Engineering Administrator will act on the request and provide email notification of the result.

Approval to specify a proprietary product is required prior to the Final Design Plan submission.